

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ANTOINE BROWN
Petitioner,

v.

ROBERT SHANNON, *et.al.*
Respondents.

:
:
:
:
:
:
:
:

CIVIL ACTION
NO. 01-788

MEMORANDUM AND ORDER

YOHN, J.

MAY _____, 2002

Presently before the court is a pro se petition for a writ of habeas corpus filed by petitioner, Antoine Brown, pursuant to 28 U.S.C. § 2254. For the reasons that follow, the petition will be denied.

PROCEDURAL HISTORY and BACKGROUND

Antoine Brown (“Brown”) was convicted for the assault of a co-worker, William Rase (“Rase”), which occurred on December 7, 1990. As a result of this attack, Rase was in a coma for five months and when he emerged from the coma, Rase was unable to speak and was paralyzed from the waist down. After months of therapy, Rase learned to communicate “yes” and “no” by using his thumb. Ultimately, in April 1992, Rase was able to identify Brown as the man who assaulted him. It was at this time that Brown was arrested and charged with aggravated assault and possession of an instrument of crime (“PIC”).

On February 23, 1994, following a jury trial in the Pennsylvania Court of Common Pleas, Brown was convicted of aggravated assault and PIC. Brown was subsequently sentenced to consecutive sentences of ten to twenty years imprisonment for the aggravated assault charge and two and one-half to five years imprisonment for the PIC charge. The Pennsylvania Superior Court affirmed the conviction on March 29, 1996. *Commonwealth v. Brown*, 673 A.2d 975 (Pa. Super. 1996). The Supreme Court of Pennsylvania denied his allocatur petition on September 17, 1996.

On July 28, 1997, Brown filed a pro se petition under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S. § 9541, *et. seq.* On November 10, 1998, the PCRA court dismissed Brown's petition. The superior court affirmed this dismissal on June 7, 2000 and the supreme court denied allocatur on October 10, 2000.

On February 14, 2001, Brown filed the instant federal habeas corpus action pursuant to 28 U.S.C. § 2254. In this petition, Brown raises the following claims for relief: (1) that the trial court violated his due process right to a fair trial by ruling that his participation in an Accelerated Rehabilitation Disposition ("ARD") program and his theft conviction of sixteen years prior to trial could be used to impeach him, and (2) that he was denied effective assistance of counsel when his trial counsel failed to request that a *nalibich* charge be given to the jury, to object to the admissibility of a knife as too remote, and to adhere to 42 Pa. C.S.A. § 5918 when questioning him about his possession of the knife.

On June 26, 2001, the court referred this matter to Magistrate Judge Diane M. Welsh for a report and recommendation. On January 1, 2002, Magistrate Judge Welsh recommended that Brown's petition for a writ of habeas corpus be denied, finding that Brown's first claim for

habeas relief was procedurally defaulted and that his second claim for relief was without merit. In response, Brown filed objection to the Magistrate Judge's report and recommendation.

Brown objected to the Magistrate Judge's finding that he had procedurally defaulted his due process claim. However, Brown argued that should the court agree with the Magistrate Judge that a procedural default occurred, equity dictated that he be given the opportunity to address the question of whether his procedural default was excused. As a result, the court afforded Brown the opportunity to demonstrate "cause and prejudice" or a "fundamental miscarriage of justice" for his procedural default, and on April 11, 2002, Brown filed a brief addressing this issue.

DISCUSSION

Brown's habeas petition raises two primary grounds for relief. First, Brown claims that the trial court denied him a fair trial by allowing him to be impeached with the evidence of his theft conviction from 1978 and his participation in an ARD program after an entirely separate theft charge in 1979. Because under 28 U.S.C. § 2254 a claim is not cognizable in habeas corpus unless it is based on federal law or the Constitution, this court will assume that Brown is arguing that the trial court's decision to admit this evidence for impeachment purposes so infused the trial with unfairness as to violate his due process rights. *See Lisben v. California*, 314 U.S. 219, 228 (1941) (finding that errors of state law rise to a constitutional dimension only if they "so infused the trial with unfairness as to deny due process of law"). Second, Brown raises an ineffective assistance of counsel claim, arguing that his trial counsel was ineffective for three reasons: (1) for failing to request that an alibi charge be given to the jury, (2) for failing to object to the

admissibility of a knife that was found on Brown when he was arrested over a year after the offense occurred, and (3) for violating 42 Pa.C.S.A. § 5918 by asking Brown questions concerning his possession of the knife.

I. Admissibility of Brown's Prior Theft Conviction and ARD Participation

In her report and recommendation, Magistrate Judge Welsh found that Brown had procedurally defaulted the first ground he now presents for habeas relief, namely whether the trial court denied him due process of law by admitting evidence of his prior 1978 theft conviction and 1979 ARD program participation. As a result, she found this claim barred from review by a federal habeas court. For the reasons set forth below, I agree with Magistrate Judge Welsh's conclusion that Brown's due process claim is procedurally defaulted and consequently may not be reviewed by the court.

A. Exhaustion of Remedies

Before a federal court may consider a habeas application, the habeas petitioner must have "exhausted the remedies available in the courts of the State" 28 U.S.C. § 2254(b). The exhaustion requirement demands that the petitioner "fairly present" each claim in his petition to each level of the state courts. *O'Sullivan v. Boerckel*, 526 U.S. 838, 847 (1999).

In the case at hand, the relevant state procedural history includes both a direct appeal and a petition filed pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541, *et. seq.* However, in neither state forum did Brown raise an explicit claim that his due process rights had been violated. On direct appeal Brown's new counsel challenged the trial

court's decision to admit evidence of his ARD program participation, but he did soon state evidentiary, and not on federal due process grounds. ¹ *Commonwealth of Pennsylvania v. Brown* , 673 A.2d 975, 978 (Pa. Super. 1996). Specifically, Brown raised the issue of whether it was reversible error to allow his participation in the ARD program to be used to impeach his credibility as a witness and so charge the jury. *Id.* Similarly, Brown's direct appeal challenge to the admissibility of his prior theft conviction was made on state evidentiary grounds. Brown raised this evidentiary challenge indirectly as an ineffective assistance of counsel claim, which focused on his trial counsel's failure to object to the trial court's decision to admit Brown's theft conviction and to charge his jury that this evidence could be used for impeachment. *Id.* Brown also challenged the admissibility of his theft crime and his ARD program participation in his PCRA petition, but once again he did not claim that the wrongful admission of this evidence violated his federal due process rights. Instead, Brown's PCRA petition raises the state evidentiary issue, by way of an independent assistance of counsel claim, of whether his theft crimes were too remote to be admitted for impeachment purposes. ²

¹ Because Brown's direct appeal brief is not in the state record, I cannot verify that the issues set forth by the superior court's opinion are the same issues Brown raised on appeal. For purposes of exhaustion, however, I have no choice but to rely on the superior court's opinion to determine whether the issues raised in Brown's habeas petition were raised on appeal.

² In his PCRA petition, Brown alleges that "this is a case of layered ineffective assistance of counsel (appellate counsel for failure to raise and preserve the claims asserted herein)." The ineffectiveness claims relevant to this habeas motion were framed in Brown's PCRA petition as follows: (1) "Failure to request a *libi* instruction," (2) "Failure to object to the admissibility of a knife (found on defendant's person at the time of his arrest) as too remote, and without a proper foundation being laid," (3) "Trial counsel and the district attorney improperly questioned defendant regarding his practice/habit of carrying a knife," and (4) "Failure to pursue the inadmissibility of the theft crimes as too remote."

Although Brown challenged the admissibility of his theft crimes, he did not explicitly challenge the admissibility of his participation in the ARD program. However, the pluralization

Brown argues that “even if framed in state law rather than federal constitutional terms,” his due process claim was nevertheless implicated in the state court proceedings, and that this is enough for purposes of exhaustion. ³Doc. 18 at 2. I disagree. For purposes of exhaustion, in order for a claim to be fairly presented in state court, “a petitioner must present the federal claim’s factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.” *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999). Mere similarity of state and federal claims is insufficient to constitute exhaustion. *Id.* Thus, in order for Brown’s federal due process claim to be deemed exhausted, Brown must have actually put the state court on notice of his federal claim. Whether he insinuated the existence of a federal due process claim is not the question.

Brown in no way communicated to the state court that he was asserting a claim predicated on federal law. The state court was asked whether the admission into evidence of the theft conviction and ARD program participation was error under state law, whether it was error under state law to charge the jury that this evidence could be used for impeachment purposes, and whether the prejudicial effect of the wrongfully admitted evidence was harmless under state law

of the theft crimes indicate to the court that Brown’s PCRA challenge was to both his 1978 theft conviction and his 1979 participation in an ARD program that resulted from his involvement in another, entirely separate theft charge.

³Brown also claims that his PCRA petition and his appellate briefs in the Pennsylvania Superior and Supreme Courts collectively apprized the state court of his federal due process claim. Doc. 18 at 3. It appears that Brown believes that he sufficiently raised his federal due process claim by checking a box on his PCRA petition that indicated that he was eligible for PCRA relief based on a violation of the constitution of Pennsylvania or the constitution of the United States. This checked box, however, is not enough for the court to find that Brown fairly presented his federal due process claim to the state courts, especially since Brown’s elaboration of his PCRA claims did not include any mention of a federal due process violation. Moreover, the appellate briefs to which Brown refers are not contained in the state record.

given the other properly admitted evidence, *Brown*, 673 A.2d at 979-80, and not whether the wrongful admission of the impeachment evidence so infused Brown's trial with unfairness to the extent necessary to deny him due process of the law. Accordingly, the state court confined its analysis to the application of state evidentiary law. The Supreme Court has addressed exhaustion in the exact context presented here, finding that when a habeas petitioner wishes to claim that a state evidentiary ruling denied him due process of law as guaranteed by the Fourteenth Amendment, the petitioner must raise his due process challenge not only in federal court, but also in state court. *Duncan v. Henry*, 513 U.S. 364, 366 (1995). Thus, I find that Brown's state evidentiary challenges to the admissibility of his ARD program participation and his prior theft conviction do not amount to a fair presentation in the state court of his due process violation claim. Accordingly, Brown's first ground for habeas relief has not been properly exhausted.

B. Procedural Default

Exhaustion may be excused where there are literally no available state procedures to be exhausted (i.e., where exhaustion would be futile in a *de jure* sense), or where "circumstances exist that render such process ineffective to protect the rights of the applicant (i.e., where exhaustion would be futile in a *de facto* sense). 28 U.S.C. § 2254(b)(1)(B). The Third Circuit has held that exhaustion is futile when either "exhaustion is impossible due to procedural default" or "state law clearly forecloses review of the unexhausted claim." *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000). Here, Brown is procedurally barred from raising his due process claim in state court because the statute of limitations for filing another PCRA petition has expired. *Kellerv. Larkins*, 251 F.3d 408, 415 (3d Cir. 2001) (expiration of statute of limitations

constitutes a procedural bar to habeas relief). As a result, Brown's failure to exhaust this first claim is excused.

Although exhaustion is excused, the court is nevertheless precluded from reviewing the merits of Brown's federal due process claim. Claims deemed exhausted only because of a state procedural bar are procedurally defaulted, and a federal court may not consider such procedurally defaulted claims on their merits unless the habeas petitioner demonstrates "cause" for defaulting his claims and actual "prejudice" attributable to his inability to otherwise have the claim considered on its merits. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).⁴ In order to demonstrate "cause" for the procedural default, the petitioner must "show that some objective factor external to the defense impeded counsel's effort to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). In order to satisfy the prejudice requirement, "the habeas petitioner must prove 'not merely that the errors at... trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions.'" *Id.* at 494 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)).

Brown argues that there is "cause" and "prejudice" for his procedurally defaulted due process claim. He maintains that the "cause" for his failure to present this claim in state court was his appellate counsel's incorrect presentation of the first issue on direct appeal, namely

⁴The other way in which a procedural default may be overcome occurs if the habeas petitioner can demonstrate a sufficient probability that "failure to review his federal claim will result in a fundamental miscarriage of justice." *Edwards*, 529 U.S. at 451. A fundamental miscarriage of justice exists only in extraordinary cases where a petitioner can show his actual innocence. *Wert v. Vaughn*, 228 F.3d 178, 193 (3d Cir. 2000). This exception is not at issue here.

whether the trial court committed reversible error when it ruled that “Brown’s prior participation in the ARD program for the theft could be used to impeach his credibility.” *Commonwealth of Pennsylvania v. Brown*, 673 A.2d 975, 978 (Pa. Super. 1996). Brown argues that his counsel was ineffective for failing to frame this issue explicitly in terms of a Fourteenth Amendment due process violation.⁵

Ineffective assistance of counsel is a cause for a procedural default so long as the counsel’s performance is deficient under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984).⁶ *Murray*, 477 U.S. at 489, *Wertsv. Vaughn*, 228 F.3d 178, 193 (3d Cir. 2000). However, before an ineffective assistance of counsel claim may be used to establish cause for a procedural default, the exhaustion doctrine requires that the ineffectiveness claim be fairly presented to the state courts. *Murray* at 490. Brown maintains that he did just that in his PCRA petition⁷ and his allocatur petition to the Pennsylvania Supreme Court.⁸ A review of the state court proceedings indicates that Brown indeed raised the issue of his appellate counsel’s ineffectiveness in state court. In particular, Brown brought a claim of ineffectiveness based on his appellate counsel’s failure “to pursue the inadmissibility of the theft crimes as too remote.”

⁵In his brief on procedural default, Brown also argues that his counsel was ineffective for failing to question the trial court’s error in allowing his 1978 theft conviction to be used as impeachment evidence. This claim of ineffectiveness, however, does not explain his failure to fairly present this federal due process claim in state court, and as such it does not establish “cause” for his procedural default.

⁶For reasons set forth below, I find that Brown’s appellate counsel was not ineffective under *Strickland*.

⁷Brown’s PCRA petition was the first available state forum in which Brown could raise the ineffectiveness of his appellate counsel.

⁸The state records do not contain Brown’s supreme court allocatur petition.

Commonwealth v. Brown, No. 3653 Philadelphia 1998, slip opinion at 5 (Pa. Super. June 7, 2000). This claim, however, is in no way similar to Brown's present claim that his appellate counsel was ineffective for failing to properly identify and present the first issue on appeal as a violation of due process rights. Because the Pennsylvania courts did not have a fair opportunity to consider Brown's ineffectiveness claim as it is presented here, I find that Brown did not exhaust this claim in state court. Accordingly, it cannot be the "cause" for his procedural default.

Assuming, *arguendo*, that Brown's present ineffectiveness claim was exhausted in state court, Brown is still unable to demonstrate the requisite "cause" to excuse his procedural default, as his appellate counsel's allegedly deficient performance did not meet the standard for constitutional ineffectiveness as set forth by the Supreme Court. Under Supreme Court jurisprudence, to succeed with a claim of ineffective assistance of counsel, Brown must show (1) that his attorney's performance was objectively deficient, and (2) that his attorney's deficient performance caused him prejudice. 466 U.S. at 687-90. Prejudice will be shown if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687. Brown maintains that if his appellate counsel had specifically framed the first issue on appeal as a due process claim and included the 1978 theft conviction as well, there is a reasonable probability that the superior court would have found the admission of his 1978 theft conviction and his 1979 ARD program participation to be "error of such magnitude so as to undermine the fundamental fairness of [his] trial." Doc. 22 at 11. However, Brown has failed to demonstrate that impeachment with this evidence changed the result of his trial. In fact, Brown admits that the prosecution had presented "ample" evidence against Brown before the evidence of his theft conviction and ARD program participation were

admitted for impeachment. ⁹Doc.No.1 at 6. Because other properly admitted evidence easily proved Brown's guilt, I find that the admission of his prior theft crime and his ARD program participation, even if improper, did not create a reasonable probability that had this evidence been excluded, the result of the trial would have been different. Accordingly, there was not the sort of prejudice here that amounts to ineffective assistance of counsel. ¹⁰

In sum, Brown's due process claim concerning his theft crimes is procedurally defaulted, and his ineffective assistance of counsel claim is not "cause" for Brown's procedural default because (1) Brown did not exhaust such a claim in state court, and (2) Brown has not shown that he was "prejudiced" under the ineffectiveness standard by the alleged deficiency of his appellate counsel nor has he demonstrated any "prejudice" of the sort necessary to overcome a procedural default. As Brown has failed to demonstrate that his federal due process claim fits the narrow exception for excusing procedurally defaulted claims, Brown's federal due process claim is procedurally barred from habeas review.

II. Ineffective Assistance of Counsel

These second ground Brown presents for habeas relief is that he was denied effective

⁹The incriminating evidence included: (1) testimony from the victim's speech pathologist that the victim identified petitioner as his attacker; (2) testimony from the victim identifying petitioner as his attacker; (3) evidence that the petitioner was a co-worker of the victim at the cemetery on the day of the event, and therefore presumably known to the victim; and (4) petitioner's signed statement to police and trial testimony that placed him in the cemetery in proximity to the crime scene at the relevant times. Doc. 22 at 1 n.5.

¹⁰Nor was there the sort of "prejudice" that is required to overcome a procedural default. Brown has not proven that the errors at trial "worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions." *Murray*, 477 U.S. at 494.

assistance of counsel for three reasons: (1) because his trial counsel failed to request an alibi charge, (2) because his counsel failed to object to the admission of a knife found on Brown's person when he was arrested over a year after the offense occurred, and (3) because his counsel improperly questioned Brown about his possession of the knife. All three parts of this ineffectiveness claim have been fairly presented in Brown's PCRA petition, and as such, the exhaustion requirement for these claims has been met.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), habeas relief is available with respect to a claim that was adjudicated on the merits in state court only where "the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). Because Brown's claim does not concern an allegedly unreasonable factual determination on the part of the state courts, the only possible basis for federal habeas relief would be if the state court's decision was contrary to, or an unreasonable application of, clearly established federal law. Here the clearly established federal law is the ineffective assistance of counsel standard enunciated by the Supreme Court in *Strickland*.¹¹

A. Failure to Request an Alibi Charge

¹¹ As noted to above, under *Strickland*, to succeed with a claim of ineffective assistance of counsel, Brown must show (1) that his attorney's performance was objectively deficient, and (2) that this attorney's deficient performance caused him prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984).

Brown maintainsthat his trial counsel was ineffective for failing to request that an alibi instruction be given to the jury. The superior court addressed this claim on the merits when reviewing Brown's PCRA appeal, finding that under Pennsylvania law Brown was not entitled to an alibi instruction, and therefore his trial counsel could not be ineffective for failing to request such a jury charge. *Commonwealth v. Brown*, No. 3653 Philadelphia 1998, slip opinion at 12 (Pa. Super. June 7, 2000).

In his motion for habeas relief, Brown relies entirely on state law to argue that his counsel was ineffective for failing to request an alibi charge. The federal habeas court, however, may not review the state court's determination that under state law Brown was not entitled to an alibi instruction. *See Estelle v. McGuire*, 502 U.S. 62, 68 (1991). ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Federal habeas relief may be granted only if the state court's failure to give an alibi charge amounted to a violation of federal law. *Id.* Brown has not pointed to any federal law, let alone clearly established federal law, that requires a court to give an alibi instruction under the facts of this case. The Third Circuit has plainly stated that there is no constitutional mandate that an alibi charge always be given to a jury when requested by a defendant. *United States v. Simon*, 995 F.2d 1236, 1244 (3d Cir. 1993). As such, the only issue before the court is whether the superior court's finding that Brown's trial counsel was not ineffective for failing to request an alibi instruction to which Brown was not entitled under state law is contrary to, or an unreasonable application of, the Supreme Court decision in *Strickland v. Washington*.

As noted by Magistrate Judge Welsh in her report and recommendation, the Supreme Court has never held a lawyer's performance to be constitutionally deficient under *Strickland* for

failing to request a jury charge to which his client was not entitled. Such a finding would have the undesirable effect of increasing the number of meritless jury charge requests made to a court. Moreover, a determination that Brown's trial counsel could not be ineffective on this basis is consistent with the Third Circuit precedent applying *Strickland*. See *Moore v. Deputy Commissioners of SCI-Huntingdon*, 946 F.2d 236, 245 (3d Cir. 1991) (counsel not ineffective for failing to object to a jury charge of accomplice liability when such a charge was justified on the basis of the evidence). See generally *Moore v. Morton*, 255 F.3d 95, 105 n.8 (3d Cir. 2001) (decisions of inferior federal courts are "helpful amplifications of Supreme Court precedent."). Because the superior court's conclusion that Brown's counsel was not ineffective for failing to request an alibi charge is not contrary to, or an unreasonable application of, Supreme Court precedent, I agree with Magistrate Judge Welsh that this claim cannot serve as the basis for federal habeas relief pursuant to § 2254.

B. Failure to Object to Admissibility of Knife

Brown's second basis for claiming ineffective assistance of counsel is that his trial counsel failed to object to the admissibility of a knife that was found on him when he was arrested over a year after the offense occurred. When reviewing Brown's PCRA appeal, the superior court addressed this ineffectiveness claim on the merits and found that under Pennsylvania law the knife was properly admitted into evidence and that Brown's counsel was not ineffective for objecting to the admission of the knife since any objection would have been without merit. *Commonwealth v. Brown*, No. 3653 Philadelphia 1998, slip opinion at 17-18 (Pa. Super. June 7, 2000).

Likethesuperiorcourt'sfindingthatBrownwasnotentitledtoanalibicharge,the habeascourtmaynotreconsiderthesuperiorcourt'srulingthattheknifefoundonBrown's personwasadmissibleevidence,asthisdeterminationwasbasedonanapplicationofstatelaw. *Estelle*, 502 U.S. at 68. Thus, federal habeas relief may be granted only if the admission of the knife amounted to a violation of federal law. *Id.* Again, Brown has not pointed to any federal law, let alone a clearly established federal law, nor is the court aware of any federal law under the facts of this case that requires a state court to exclude evidence even when it is deemed relevant and admissible under state law. As such, the only issue before the court is whether the superior court correctly applied *Strickland* in determining that Brown's counsel was not ineffective for failing to object to the admission of admissible evidence.

The Supreme Court has never held a lawyer to be ineffective for failing to object to the admission of relevant evidence. Such a finding would give attorneys a legitimate reason to object to all evidence introduced at trial, even that which is obviously relevant and admissible. Moreover, applying *Strickland*, the Third Circuit has instructively found that counsel cannot be considered ineffective for failing to raise a meritless objection. *See Moore*, 946 F.2d at 245 (counsel not ineffective for failing to object to a jury charge of accomplice liability when such a charge was justified on the basis of the evidence). *See generally Morton*, 255 F.3d at 105 n.8. Thus, I agree with Magistrate Judge Welsh that the superior court's finding that Brown's counsel was not ineffective for failing to object to the admission of the knife is not contrary to, or based on an unreasonable application of, the Supreme Court's decision in *Strickland*. As a result, this claim cannot serve as the basis for federal habeas relief pursuant to § 2254.

C. Questions Concerning Brown's Possession of a Knife

12

Brown's final claim of ineffectiveness is that his counsel violated 42 Pa.C.S.A. § 5918 by asking him questions concerning why he carried a knife on his person. Brown maintains that this line of questioning allowed the jury to draw an improper inference that Brown was the type of person to violate the law and that Brown is generally a man of bad character or reputation. In adjudicating this claim, the superior court found that trial counsel's questioning of Brown's habit of carrying a knife was based on rational trial strategy, and that since the questioning had a reasonable basis, Brown's counsel could not be considered ineffective. *Commonwealth v. Brown*, No. 3653 Philadelphia 1998, slip opinion at 18, 19 (Pa. Super. June 7, 2000).

The superior court's determination that Brown's counsel was not ineffective for questioning Brown about his possession of the knife was not an unreasonable application of *Strickland*. When considering whether an attorney's performance is objectively deficient so as to amount to ineffective assistance of counsel under *Strickland*, the court must defer to counsel's tactical decisions, must not employ hindsight, and must give counsel the benefit of a strong presumption of reasonableness. *Deputy v. Taylor*, 19 F.3d 1485, 1493 (3d Cir. 1994). Because the prosecution had been allowed to use the knife to establish that Brown may have been carrying a knife on the date of the assault, it was certainly a rational trial strategy for Brown's counsel to attempt to prove that Brown's possession of the knife was unrelated to the crime with which he was charged. By questioning Brown about his possession of the knife, counsel was attempting to show that Brown carried a knife for reasons related to his work and not to a criminal intent.

¹²Section 5918 provides that a criminal defendant should not be asked "any question tending to show that he has committed...any offense other than the one with which he shall be charged, or tending to show that he has been of bad character or reputation."

Brown's counsel was reasonable in hoping that a non-criminal explanation for Brown's possession of the knife would diminish the probability that the jury would draw an adverse inference that Brown carried the knife in order to commit the assault with which he was charged. Accordingly, the presumption of counsel's reasonableness in pursuing this line of questioning cannot be overcome here. Thus, I find that Brown's counsel was not objectively deficient and that Brown's ineffectiveness claim fails the first prong of the *Strickland* analysis.

As the superior court's determination that Brown's counsel was not ineffective for questioning Brown about his possession of the knife is consistent with a reasonable application of the *Strickland* standard, I agree with Magistrate Judge Welsh that this ineffectiveness claim does not establish Brown's right to federal habeas relief pursuant to § 2254. ¹³

CONCLUSION

For the foregoing reasons, Brown's habeas petition will be denied. Brown's claim that he was denied due process of law is non-justiciable because it was not exhausted in the Pennsylvania state courts and is currently procedurally defaulted under Pennsylvania law. Brown's ineffective assistance of counsel claim fails because the Pennsylvania Superior Court's adjudication of the merits of this claim was not contrary to, and did not involve an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States.

An appropriate order follows.

¹³ The superior court's determination was also not contrary to Supreme Court precedent, as this court is unaware of any Supreme Court decision holding a lawyer to be ineffective for questioning his client in a rational manner.

**INTHEUNITEDSTATESDISTRICTCOURT
FORTHEEASTERNDISTRICTOFPENNSYLVANIA**

ANTOINEBROWN
Petitioner,

v.

ROBERTSHANNON, *et.al.*
Respondents.

:
:
:
:
:
:
:
:

CIVILACTION
NO.01-788

ORDER

And now, this ____ day of May 2002, upon consideration of the petitioner's application for habeas corpus under 28 U.S.C. § 2254 (Doc. No. 1); the respondent's answer to the petition for habeas corpus (Doc. No. 15); the petitioner's reply thereto (Doc. No. 16); the report and recommendation of the Magistrate Judge Welsh (Doc. No. 17); the petitioner's objection thereto (Doc. No. 18); and the petitioner's brief on procedural default (Doc. No. 22); it is hereby ORDERED that the petitioner's application for habeas corpus is DENIED. As there has been no substantial showing of the denial of a constitutional right, it is further ORDERED that no certificate of appealability shall issue.

William H. Yohn, Jr., Judge